JD(ATL)–02–05
Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ST. MARY'S ACQUISITION CO., INC., d/b/a ST. MARY'S NURSING HOME

and Case 7–CA–46544

JAMES GORDON, an Individual

Andrew M. MacEachern, Esq., for the General Counsel.
Costanzo Z. Lijoi, Esq., for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

George Carson II, Administrative Law Judge. This case was tried in Detroit, Michigan, on January 12 and November 22, 2004. The complaint issued on October 30, 2003.[1] It alleges that the Respondent violated Section 8(a)(3) and (4) of the National Labor Relations Act by suspending and discharging the Charging Party because of his union activity and filing of unfair labor practice charges with the Board. The Respondent's answer denies that it violated the Act. I find that the discharge of the Charging Party did violate Section 8(a)(3) of the Act.

On January 12, 2004, Administrative Law Judge Pargen Robertson granted the motion of the Respondent to dismiss the complaint because the General Counsel failed to establish any evidence of the Respondent's union animus. The General Counsel filed exceptions to the dismissal. On August 31, 2004, the Board, in *St. Mary's Nursing Home*, 342 NLRB No. 100 (2004), reversed Judge Robertson's grant of the motion to dismiss and remanded the case. The Board ordered that the hearing be reopened before a different administrative law judge.

On September 10, 2004, this case was assigned to me. The hearing was reopened on November 22, 2004. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, St. Mary's Acquisition Co., Inc., d/b/a St. Mary's Nursing Home, the Nursing Home, a corporation, is engaged in providing nursing home services at its facility in St. Clair Shores, Michigan, at which it annually derives gross revenues in excess of $100,000 and at which it purchases and receives goods and materials valued in excess of $5,000 directly from

[1] All dates are in the year 2003 unless otherwise indicated. The charge was filed on August 22 and was amended on October 10.

suppliers located outside the State of Michigan. The Respondent admits, and I find and conclude, that the Nursing Home is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Local 79, Service Employees International Union, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

An election was held on July 18, 2002, in which the employees of the Nursing Home selected the Union as their collective bargaining representative. Charging Party James Gordon served as an observer for the Union at the election.

Thereafter, on August 16, 2002, Gordon was discharged. He filed an unfair labor practice charge. On February 3, the Region issued a consolidated complaint in which the charge filed by Gordon was consolidated for hearing with a charge filed by the Union. The parties settled those matters, and on June 2, the Regional Director approved an informal settlement agreement that, inter alia, provided for the posting of a Notice to Employees and Gordon's reinstatement. After some delay, the reason for which is not accounted for in the record, Gordon returned to work on July 14.

The allegations in the consolidated complaint that were settled, in addition to the discharge, included the discipline of Gordon pursuant to enforcement of a no-access rule and several independent Section 8(a)(1) violations including a coercive interrogation and threat that management would no longer help employees. Gordon's termination related to his alleged falsification of documents relating to the feeding of a resident. Gordon contended that he had fed the resident, but that contention was disputed by Unit Manager Kathy Roberts.

Judge Robertson refused to permit the General Counsel to present evidence of animus from the settled case and dismissed the complaint herein because of the absence of evidence of animus. The Board, in *St. Mary's Nursing Home*, supra, directed that the General Counsel be permitted to present evidence from the settled 2002 case "for the purpose of establishing that the suspension and discharge of Gordon in 2003 were unlawfully motivated." Id. at slip op. 2. As noted in the Board decision, the allegations from the 2002 settled case were not re-alleged, thus I shall make no unfair labor practice finding with regard to them.

At the reopened hearing, Gordon testified that, in 2002, his wife would drop him at the Nursing Home sometime between 1 p.m. and 2 p.m., usually at 1:30 or so, on the way to her job to which she reported at 2:30 p.m. He would then wait in the employee break room until his shift began at 3 p.m. On some occasions, he would be requested to begin work early, thereby obtaining overtime. Gordon began participating in the Union organizational effort in May 2002 by passing out authorization cards in the break room and speaking with employees in favor of the Union. At no time prior to June 2002 was he directed not to enter the premises after his wife dropped him off. It is undisputed that the Nursing Home had a rule prohibiting off-duty employees from entering the building more than 15 minutes before their shift. The rule itself was not alleged as unlawful in the settled case. On June 28, former administrator Gail Sliwinski directed Gordon to comply with the rule and not to enter the premises more than 15 minutes before his shift. Gordon sought to comply with the rule by going to a nearby restaurant, but he would fall asleep while waiting there and so he resumed going into the break room, knowing

that this violated Sliwinski's instructions. Sliwinski spoke with him again regarding his early reporting on July 3 and, on July 23, suspended him for violating the rule.

Former employee Denise Butler gave testimony at the reopened hearing regarding several of the independent Section 8(a)(1) allegations in the settled case. I shall not address the remarks she attributed to Scheduling Coordinator Lisa McMahon because there is no probative evidence that McMahon was a supervisor as defined in the Act. Butler also testified to a conversation with In-service Director Kathy Leonard, an admitted supervisor. In July 2002, prior to the election, Butler was asked to work an overtime shift. Supervisor Leonard promised Butler that she would be compensated at double time and one half for working the shift. Leonard was informed that Butler could not be compensated in that manner. After being so informed, Leonard spoke with Butler. The conversation began in the hallway, but they then stepped into an empty resident room. Leonard informed Butler of what she had been told but stated that she would "pay me out of her pocket." Leonard then asked Butler "about the Union and how did I feel about the Union." The conversation continued for several minutes. In the course of the conversation, Leonard stated that the Union "was a bad thing to bring in our job, that managers could not help us anymore, and that it'd be a lot of strict rules and policies." The conversation ended when Leonard was paged. On cross-examination, Butler explained that the Nursing Home had not taken "everything so serious that the employees did, but, bringing the Union in there made everything very stricter."

Neither Sliwinski nor Leonard testified, thus the foregoing testimony of Gordon and Butler is uncontradicted. The Respondent's enforcement of its previously unenforced rule regarding early arrivals in June 2002 suggests vigilance regarding potential union activity. Its enforcement corroborates Butler's testimony that the presence of the Union "made everything … stricter." Leonard, after stating to Butler that she would pay her overtime "out of her pocket," then questioned Butler regarding her feelings about the Union and stated that, with a Union, "managers could not help us anymore" and that there would be a lot of "strict rules and policies." The foregoing statements were not explained as a "prediction of consequences of bargaining or the result of an agreement with Union." *United Artists Theater*, 277 NLRB 115, 121 (1985). Leonard was not giving "a permissible explanation regarding the changed aspect of relations if the employees selected the union as their 9(a) representative." She was making "an impermissible threat of more strict enforcement of plant rules and policies" if the employees selected the Union as their collective bargaining representative. *General Fabrications Corp.*, 328 NLRB 1114, 1131 (1999). Leonard's interrogation, made in conjunction with the threat of changed working conditions in that managers would no longer be able to help employees, as she had just done by promising to pay Butler "out of her pocket," and reference to stricter rules, was coercive. The foregoing unlawful interrogation coupled with the threat of changed working conditions establishes the Respondent's animus towards the employees' union activities.

B. Facts

Upon his reinstatement on July 14, Gordon resumed his normal duties as a certified nursing assistant, CNA.[2] Business Representative Wendell Stone requested that he join the Union negotiating committee, and on July 22, Gordon attended a bargaining session with three other employees. There is no evidence of any adverse action against those three employees. At some point after Gordon's discharge in August, the parties agreed to a contract.

[2] I shall use this standard acronym. Documents in the record refer to CENAs, which appears to be derived from the Michigan designation of these employees as "certified equivalency nursing assistant." See *Michigan Masonic Home*, 332 NLRB 1409 (2000).

On February 28, Melanie Belfry became the Administrator of the Nursing Home. In July, Registered Nurse Patricia Martz, who had formerly been a staff nurse, became the Acting Director of Nursing. In July 2004, she resumed her position as a staff nurse. Both Belfry and Martz attended the July 22 bargaining session.

In late July, CNA Page Van Tram reported to Administrator Belfry that resident Patricia Johnson had stated that she did not want Gordon caring for her, "that he was rough with her." Belfry took Johnson aside and asked her what had happened and what was the matter. Johnson did not want to talk about it, "she just wanted to go to bed." Van Tram testified that Johnson told her that Gordon had grabbed her wrist and that she was afraid of him. I do not credit that hearsay report. I am satisfied that if Johnson had asserted that Gordon had grabbed her wrist and that she feared him, Van Tram would have made that report to Belfry. Belfry testified that Van Tram reported that Johnson did not want Gordon caring for her, that he was "rough with her." I credit and shall consider only the report that Belfry acknowledged receiving.

The following week, Belfry received a report from Acting Director of Nursing Martz that a resident, Marie Babcock, wanted to speak with her. Martz testified that she made this report after Babcock had complained to her that Gordon had pulled her arms and that had hurt her and that she was afraid of him. The only report to which Belfry testified was that Martz told her that Babcock wanted to speak to her. Belfry testified that Babcock said that she did not want Gordon caring for her any more, that he was rough with her, that after he answered her call light he would turn it off and leave and not come back. Babcock claimed that Gordon had hurt her arm when he was transferring her from her wheelchair to her bed. Belfry recalled that Babcock also reported that Gordon had hurt her "when turning onto her right side, which would be facing the wall in her bed, where she had a grab bar which is like a side rail on the right side." Babcock then stated, inconsistently, that Gordon told her that she could "do it herself." Belfry added that Babcock also expressed fear of Gordon.

Upon receiving the complaint from Babcock, Belfry called Gordon to the office and suspended him, informing him that "we had a resident with a verbal allegation of abuse or neglect." Gordon acknowledges that he laughed, mentioned "trumped up charges," and said, "Here we go again, well, this is a three day vacation." Belfry's memorandum of the meeting reports that she responded to him by saying that depended "on the result of the investigation."

Thereafter, Belfry and Martz questioned residents for whom Gordon cared regarding any concerns they had. None, other than Babcock and Johnson, had any problem with Gordon.

On August 4, Belfry spoke with Johnson. She testified that Johnson reported that she did not want Gordon to care for her that he was "heavy-handed" and "hurts her when she is in bed turning." Belfry's signed memorandum of this interview dated August 4 reports that Belfry stated to Johnson that she was aware that Johnson had a "personality conflict" with Gordon. The memorandum contains no report of a complaint by Johnson that Gordon had hurt her, only that she did not like the way he treated her, "he is rough at times and has strong hands." The memorandum does not report that Johnson stated that she was afraid of Gordon, and there is no mention of his ever having grabbed her wrist. I do not credit Belfry's testimony that Johnson stated that Gordon had hurt her. No such statement is in her memorandum of August 4 or, as hereinafter discussed, in the report of the social worker who spoke with Johnson on August 5.

A complete physical examination of Babcock and Johnson was conducted shortly after Belfry's receipt of the complaints. There were no bruises, skin tears, or signs of trauma.

Former Acting Director of Nursing Martz testified that she and Belfry concluded that Gordon had been "abusive to the residents." Belfry testified that abuse can be mental as well as physical and that, in this case, the abuse was "more mental because there was the fear factor … they were afraid of Mr. Gordon." Belfry acknowledged that abuse contemplates a willful act by an employee. Martz confirmed that abuse is the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish."

Gordon was never advised of what he supposedly had or had not done, only that there had been "a verbal allegation of abuse or neglect." Belfry explained that the name of a complaining resident is not revealed to the accused employee to avoid any retaliation.

On August 6, Belfry called Gordon and informed him that he was terminated for violation of Rule 13, abuse or neglect of a resident. Gordon, at the hearing, described the careful manner in which he had assisted Johnson and Babcock. He denied that either of them had ever cried out in pain when he was attending them or stated to him that he was too rough.

Belfry reported that the Nursing Home had received the complaints of Babcock and Johnson to the Michigan Department of Commerce and Industry, which regulates nursing homes. An investigation was conducted on September 18 and 19. The investigator spoke with Babcock who reported that Gordon "was 'rough' and 'cocky' with her." Babcock also reported that she asked Gordon to assist her in turning onto her side but "he did not respond to her request." Babcock stated that she did not want Gordon to take care of her anymore. The report of the investigator does not reflect that Babcock claimed that Gordon had ever hurt her or that she was afraid of him. The report states that the investigator spoke with "the social worker" who spoke with Babcock on August 5, the day after Gordon was suspended. The social worker reported to the investigator that Babcock stated that Gordon "had not hurt her but made her feel uncomfortable during care" and had requested that he not care for her anymore. There was no report that Babcock was afraid of Gordon.

Johnson denied to the investigator that she knew Gordon and also denied that any staff member had been rough with her. The social worker reported speaking with Johnson on September 5 and that, at that time, Johnson reported that Gordon "was rough with her and requested that he not take care of her anymore." There was no claim that he had hurt her or that she was afraid of him.

The investigator's final report dated September 22 found no injury to either resident and reported that "a nurse aide failed to provide personal care in a manner to maintain dignity and respect for 2 … residents and with sensitivity to a specific care request for 1 … resident …." The Nursing Home did not reinstate Gordon after receipt of the report. Belfry was asked, "If the State's findings vary from yours do you change your conclusion?" She answered, "No," and then stated that "when a resident voices fear" the Nursing Home still had to uphold the resident's rights.

On November 26, 2002, the Nursing Home issued a first warning to employee Barbara Webb for a code of conduct violation. The warning reports that a family member had requested Webb to toilet and put his father to bed and that three hours later his father was put to bed without being toileted or cleaned. Less than a month later, on December 21, 2002, Webb received another first warning when the day shift CNA reported that the residents' incontinence pads in beds A and B in Room 47 were soiled and the room smelled of urine.

On February 18, 2004, a resident suffered two skin tears when being bathed. The Nursing Home report notes "2 (two) skin tears" and, in different handwriting, "no apparent

injury." The corrective measures to avoid repetition note that the CNA was "to utilize caution " and "when patient injury occurs please notify nurse immediately." It does not appear that this incident was reported to or investigated by the State of Michigan.

On April 7, 2004, a resident fell and broke her hip when the CNA assisting her turned her back to the resident. The CNA reported that she "thought that resident #105 was firmly seated on the toilet" but she was not and fell when the CNA turned away. Acting Director of Nursing Martz testified that the employee was disciplined; however, no document reflecting the discipline was introduced into evidence and the Nursing Home's "plan of correction" on the report of the investigation by the State of Michigan does not mention discipline. The report relating to the plan of correction regarding the complaints by Johnson and Babcock report that the responsible CNA, referring to Gordon who is not named, was suspended and terminated.

The citation received by the Nursing Home regarding the complaints by Johnson and Babcock related to "Quality of Life" in that the "facility must provide care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect …." The level of severity is coded as "D," which is classified as an isolated incident in the category "no harm … not immediate jeopardy." The citation regarding the broken hip incident related to "Quality of Care" in that the "facility must ensure that each resident receives adequate supervision and assistance devices to prevent accidents." The level of severity is coded as "G," which is classified as an isolated incident in the category "actual harm that is not immediate jeopardy." Administrator Belfry admitted that Quality of Care violations are more severe that Quality of Life violations.

C. Analysis and Concluding Findings

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Gordon engaged in union activity and that the Respondent was aware of that activity. Upon being reinstated, Gordon continued his union activity. Although only on the job for a week, he was appointed to the Union negotiating committee and attended the bargaining session of July 22 at which both Belfry and Martz were present.

The Respondent, in its brief, argues that Belfry "knew of no relationship between Gordon and the Union" and that she simply signed the Notice to Employees posted pursuant to the settlement. That notice, inter alia, states the Section 7 rights guaranteed to employees, that the Respondent will not discriminate against employees in order to discourage their union membership, support, or activities, and that the Respondent will offer Gordon "his job back" and remove "all disciplines and any reference to his discharge from his file." Belfry admitted knowing that Gordon had been terminated allegedly because of an issue regarding the feeding of a resident. Without divulging their conversation, she testified that the attorney for the Respondent called her, and "I had the option of either hiring Mr. Gordon or not hiring him." When asked whether she formed an opinion as to why Gordon was named in the Notice to Employees she testified that she "assumed because he was terminated before." When asked whether she formed an opinion as to why he was terminated, Belfry answered, "Other than what I read in his file." I find it incredible that Belfry did not know that the option was to litigate Gordon's 2002 discharge or settle the unfair labor practice complaint. Contrary to her testimony regarding the option of hiring or not hiring, I find that Belfry was fully aware, as stated in the Notice that she signed, that the Respondent agreed, "to offer James Gordon his job back." Belfry's failure to admit that she was aware that the outstanding complaint alleged that Gordon had been terminated because of his union activities and that his reinstatement would avoid litigation suggests that she was less than candid regarding knowledge of Gordon's prior union activity.

As discussed above, I find that the Respondent bore animus towards employee union activity. The Respondent argues that Belfry bore no animus toward the Union, citing her involvement in negotiations which, subsequent to Gordon's second discharge, resulted in a collective-bargaining agreement. The Respondent's compliance with its obligation to bargain in good faith does not preclude a finding of animus. Numerous Board decisions find animus and discrimination against union activists notwithstanding the existence of a collective-bargaining agreement. See *New Orleans Cold Storage Co.*, 326 NLRB 1471 at fn. 1 (1998).

Animus established by independent violations of Section 8(a)(1) of the Act by specific supervisors "is properly imputed" to the corporate respondent. *Mohawk Industries*, 334 NLRB 1170,1178 (2001). In-service Director Leonard, the supervisor who coercively interrogated and threatened Butler, continues to be employed. The Board, in remanding this case, agreed with the General Counsel that "the Board has long held that '[e]vidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before of after the settlement ….'" *St. Mary's Nursing Home*, supra at slip op. 2. As pointed out by Administrative Law Judge Wolfe in *Kaumagraph Corp.*, 316 NLRB 793 (1995):

> … [I]t is well settled that the Board may use … presettlement conduct … as background evidence in appraising Respondent's motivation for its conduct … so long as the General Counsel's case does not rely solely on the evidence proffered as background evidence. Bearing the latter caution in mind, yet recognizing the verity of the wise statement by Administrative Law Judge Maloney in *Marcus Management*, 292 NLRB 251, 262 (1989), that "there is such a thing as latent hostility which bides its time and lies in wait, seeking the appropriate occasion to work its will," I conclude the evidence of presettlement threats … is properly admissible as background evidence to consider in evaluating the motivation of Respondent for its conduct …. Id at 794.

Belfry was contacted by the Respondent's attorney regarding reinstating Gordon. Thus, she was involved in the decision of the corporate respondent to avoid litigation and offer reinstatement to Gordon. I have not credited her professed ignorance of the allegation that Gordon had been discriminatorily terminated because of his union activity. Less than a month after that reinstatement, she terminated him. Belfry's investigation of Gordon's alleged abuse of residents was perfunctory at best. Her August 4 memorandum of her interview with Johnson does not reveal any abuse. It does not mention Johnson reporting that Gordon had hurt her, only that he was "rough at times" and had "strong hands." The memorandum does not report that Johnson stated that she was afraid of Gordon or that he had grabbed her wrist. There is no memorandum of Belfry's conversation with Babcock in which Belfry asserted that Babcock stated that Gordon had hurt her. On August 5, the very next day, the social worker, identified by position rather than name in the report of the investigator from the State of Michigan, spoke with both Johnson and Babcock. According to that investigative report, the social worker reported that, on August 5, Johnson stated only that Gordon "was rough with her and requested that he not take care of her anymore" and that, on August 5, Babcock, in direct contradiction of Belfry's report of what she said, stated that Gordon "had not hurt her but made her feel uncomfortable during care." Belfry did not, so far as this record shows, even speak with the social worker prior to terminating Gordon. "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

Upon receiving the report of a complaint by Johnson, Belfry sought to speak with her, but Johnson refused. After receiving Babcock's complaint, Belfry informed Gordon that he was

being suspended because of a complaint from a resident. Giving the Respondent every benefit of any doubt, I find that the Respondent, on the basis of the initial report of Babcock claiming that Gordon had hurt her, was justified in suspending him pending investigation. I shall, therefore, recommend that the allegation relating to the unlawful suspension be dismissed.

The social worker, who is not identified in the record, did not testify. Belfry did not mention that a social worker was involved in the investigation. Having credited Belfry's memorandum rather than her testimony, I find that there was no claim that Gordon had hurt Johnson or that she was afraid of him. Babcock denied to the social worker that Gordon had hurt her and there is no report of her being afraid of Gordon. The report of the State of Michigan investigator reflects that the social worker reported that the interviews with Johnson and Babcock occurred on August 5, the day before Gordon was discharged. Belfry did not testify that she consulted with the social worker at any time. Insofar as Belfry did not, prior to discharging Gordon, consult with the social worker who had interviewed the complaining residents, her investigation was incompetent. If she did speak to the social worker but omitted from her testimony that the social worker reported that Babcock had stated specifically that Gordon had not hurt her, Belfry's testimony was incomplete.

Gordon was given no opportunity to respond to the accusations upon which the Respondent based his discharge. He was never advised of what he supposedly had or had not done. Belfry explained that the name of a complaining resident is not revealed to the accused employee to avoid any retaliation. Even so, Gordon could have been questioned regarding whether he was aware of having hurt any resident. He was not asked that question. Both Johnson and Babcock were identified as the complaining residents after his termination. At the hearing, Gordon described the manner in which he cared for Johnson and Babcock and denied that either had cried out in pain or stated to him that he had hurt her. This testimony is totally consistent with the absence of any claim by Johnson that Gordon had hurt her and with Babcock's report to the social worker that Gordon had not hurt her and her report to the investigator that she had not complained to Gordon. It is also totally consistent with their physical examinations.

There is not a scintilla of evidence that Gordon physically abused either Johnson or Babcock. There is no credible evidence that Johnson claimed that Gordon had hurt her. Although Belfry testified that Babcock claimed that Gordon had hurt her, the very next day Babcock told the social worker that he had not hurt her. The physical examinations of Johnson and Babcock revealed no evidence whatsoever of any physical abuse.

Belfry testified that abuse can be mental as well as physical. There is no probative evidence of mental abuse by Gordon. There is no credible evidence that Johnson ever claimed that she was afraid of Gordon. Although Belfry testified that Babcock claimed that she was afraid of Gordon, Belfry made no memorandum of that conversation. Babcock did not state that she was afraid of Gordon to the social worker or to the investigator from the State of Michigan. That investigation revealed no physical or mental abuse by Gordon, only a desire on the part of Johnson and Babcock not to be cared for by Gordon. When Belfry surveyed other residents regarding the care that they had received from Gordon, none complained. Gordon could not deny that Johnson did not want to be cared for by him because he had "strong hands." Nor could he dispute Babcock's assertion of feeling "uncomfortable." Neither of the foregoing complaints establishes mental abuse, the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." Gordon, a tall, physically fit African-American, cannot be held responsible for the preference of caregiver expressed by Johnson and Babcock. The fact that Johnson and Babcock did not want to be cared for by Gordon does not establish mental abuse. There is no evidence that Gordon willfully

took any inappropriate action with regard to either Johnson or Babcock.

Belfry's investigation was incomplete. An employer may not assert a reasonable belief that an employee has engaged in misconduct based upon an unfair investigation. *Midnight Rose Hotel & Casino*, 343 NLRB No. 107, slip op. at 3 (2004) Belfry chose to believe Babcock's report that Gordon had hurt her with no further inquiry. Belfry testified that Babcock reported that she did not want Gordon caring for her any more, that he was rough with her, that after answering her call light he would not come back, that he had hurt her arm when transferring her from her wheelchair and "when turning onto her right side." Belfry ignored Babcock's inconsistent further comment that Gordon told her that "she could do it [turn onto her side] herself." The social worker, with whom Belfry did not consult, reported that, on August 5, Babcock stated that Gordon had not hurt her. In September, Babcock made no claim to the investigator that Gordon had hurt her. The report reflects that Babcock stated that Gordon "was 'rough' and 'cocky' with her" and that she asked Gordon to assist her in turning onto her side but "he did not respond to her request." So far as the record shows, Belfry did not consult with any other CNAs or residents regarding Babcock's self report of being hurt. Belfry's conclusion that Gordon was guilty of abuse, a prerequisite for which is willful conduct, was uncorroborated by any evidence of physical injury. No other residents for whom Gordon cared expressed any problem with the care that they received from him. Babcock herself had contradicted the statement that Gordon had hurt her, the statement upon which Belfry relied, to the social worker on August 5, prior to Gordon's discharge.

Babcock did not report to the investigator that Gordon would turn out her call light and not return. She did report that she requested Gordon to turn her onto her side but that he did not respond to the request. The investigator characterized that alleged inaction as failure to provide care "with sensitivity to a specific care request." The foregoing inactions by Gordon, assuming they occurred, would constitute neglect, not abuse. The Respondent has never terminated any employee for neglect, even serious instances of neglect resulting in broken bones. Failure to pay proper attention to residents has not resulted in suspension or termination even when injury has occurred, as in the case of the CNA who turned away too soon resulting in a resident falling and breaking her hip, or when family members have complained, as in the case of the first warning given to the CNA who failed to toilet a resident. That same CNA received a second first warning for failing to attend to soiled beds.

Belfry was obviously taken aback by Gordon's reaction to his suspension as reflected by her demeanor when testifying about the incident and her memorandum referring to the "vacation" being dependent upon the outcome of the investigation. Although totally inappropriate, Gordon's laughing, referring to "trumped up charges," and stating, "Here we go again, well, this is a three day vacation" is understandable in view of the fact that he had been previously suspended and terminated within a month of the Union's election victory, and, as he stated to Belfry, thought "here we go again" when he was suspended less than a month after his reinstatement. Although Gordon's reaction was inappropriate, there is no contention that Gordon was terminated for his interaction with Belfry at that meeting.

Even if I were to have found that the Respondent was privileged to rely upon Belfry's inadequate investigation, upon receipt of the State of Michigan investigator's report that contained no finding of abuse, the Respondent could have rescinded the discharge. Its failure to do so further confirms the Respondent's animus towards Gordon's continuing union activity.

There is no evidence that Gordon's termination related to his filing the prior charge rather than his continued leadership in union activities, as established by his appointment to the negotiating committee, I shall recommend that the Section 8(a)(4) allegation be dismissed.

The termination of Gordon within a month of his reinstatement was an adverse action directly affecting the tenure of his employment. The General Counsel established that Gordon's union activity was a substantial and motivating factor for the Respondent's action. *Manno Electric*, 321 NLRB 278 (1996). The Respondent has not established that Gordon would have been discharged in the absence of his union activity. By terminating James Gordon because of his union activity the Respondent violated Section 8(a)(3) of the Act.

Conclusions of Law

By discharging James Gordon on August 6, 2003, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged James Gordon, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, St. Mary's Acquisition Co., Inc., d/b/a St. Mary's Nursing Home, St. Clair Shores, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 79, Service Employees International Union, AFL-CIO, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer James Gordon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make James Gordon whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify James Gordon in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in St. Clair Shores, Michigan, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 26, 2005

George Carson II
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 79, Service Employees International Union, AFL-CIO, or any other union.

WE WILL, within 14 days from the date of the Board's Order, offer James Gordon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of James Gordon and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

ST. MARY'S ACQUISITION CO., INC. d/b/a ST. MARY'S NURSING HOME

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226–2569
(313) 226–3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226–3244